

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000814-MR

N.H.P.

APPELLANT

APPEAL FROM FRANKLIN FAMILY COURT
v. HONORABLE REED RHORER, JUDGE
ACTION NO. 03-AD-00043

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN
and C.C.H., JR., AN INFANT

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, JOHNSON, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, N.H.P., appeals the order of the Franklin Circuit Court terminating her parental rights to her minor son. We affirm the termination of parental rights.

Appellant is the biological mother of the child. The child's biological father has never been found. The child was born in 1997. In December 2002, the child was removed from Appellant's custody. On January 10, 2003, the child was found

to be neglected by the Franklin Circuit Court, Family Division, and remanded to the care and custody of the Commonwealth, Cabinet for Families and Children. His physical condition was so deplorable when he was removed from his home that Appellant was charged with the criminal offense of violating KRS 530.060, Endangering the Welfare of a Minor. The child's physical condition at that time required medical attention. On November 18, 2003, the Cabinet filed a Petition for Involuntary Termination of Appellant's Parental Rights in the Franklin Circuit Court, Family Division. Appellant contested the Petition. The child's guardian ad litem filed a report indicating that termination would be in the best interests of the child. The court involuntarily terminated Appellant's parental rights.

A Family Services Worker, Ms. McCoun, testified at the hearing on termination. McCoun stated that there were no documented problems with Appellant's parenting prior to 2002. At the hearing, the child's teacher testified that the child appeared to have been neglected and hungry for a considerable period of time prior to December 2002, and that his condition on that date was not a one-time occurrence. In December 2002, the child was removed from Appellant's custody under an Emergency Custody Order. At that time the child was not bathed; had lice;

had ill-fitting clothes causing sores on his body; and was hungry because there was insufficient food in the home.

On January 10, 2003, Appellant was arrested for possession of a controlled substance and assault. The Circuit Court, Family Division, adopted alternative sentencing for Appellant, including fines, participation in the Kentucky Alternatives Program, and mandatory parenting classes. For a time Appellant attended counseling and parenting classes. In spring 2003, Appellant failed a drug screen, and was jailed for a brief time. Appellant was then arrested for unlawful taking of property. Appellant was also charged with several instances of assault. Both Appellant and her husband are battling drug addiction.

Without authority to do so, and in violation of the court's orders and the terms of her probation, Appellant and her husband moved to Louisville. Appellant testified that this was to escape their negative surroundings in Frankfort. Appellant did not exercise visitation with the child from May to November of 2003. The court noted that Appellant did not contact her probation officer or the Cabinet when she left Frankfort, and that neither the court, the Cabinet, nor her son knew where she was for that period of months.

Appellant failed to participate in the Kentucky Alternatives Program from May through November 2003. When she

was arrested Appellant was jailed for 60 days in September 2003. At that time the Cabinet changed its goals for the child from reunification with the parent, to involuntary termination of parental rights. While Appellant was incarcerated, the Cabinet drew up a prevention plan with her, requiring her to perform certain activities with the child, and to obtain a stable home and employment. Appellant's visitation was increased to one hour per week. A Cabinet representative testified at trial that this was standard procedure, despite the fact that the Cabinet's goal for the child was now termination of parental rights. The record shows that Appellant complied with all conditions, and attended all visitation sessions. The record reflects that Appellant did not comply with the Cabinet's conditions or the court's directives until after such time as she was served with the petition to terminate her parental rights.

Dr. Arman Friedli worked closely with the child and his therapist for a number of months. Dr. Friedli stated that the child suffered from Post-Traumatic Stress Disorder and Reactive Attachment Disorder as a result of his home environment. Dr. Friedli testified that the severity of these conditions gradually subsided when the child was placed with his foster family. Evidence was presented showing the child's adjustment to his foster family, and his greatly improved physical and mental condition.

Appellant contends that the court erred in failing to consider less drastic alternatives than termination in this case. The law holds that "parental rights are so fundamentally esteemed under our system that they are accorded due process protection under the [United States Constitution]. . . ." O.S. v. C.F., 655 S.W.2d 32, 33 (Ky.App. 1983). A court must consider less drastic alternatives prior to severing the parental rights. L.B.A. v. H.A., 731 S.W.2d 834, 836 (Ky.App. 1987). The Cabinet contends that Appellant refused to comply with her duties to care for and to visit with the child until she was served with the Petition to terminate her parental rights in November 2003. The record reflects that less drastic alternatives were attempted from January to November 2003, but that Appellant failed to complete the required actions, and hid from the court and her son during that time.

Appellant asserts that the court's finding that she had failed to provide essential parental care for the child, and that there was no reasonable expectation of improvement was in error. Appellant cites authority holding that "parental rights are not severed merely because a child would have a better home elsewhere. . . ." O.S. v. C.F., 655 S.W.2d 32, 34 (Ky.App. 1983). Appellant claims that she only neglected the child on that one instance in December 2002, and that she has complied with all Cabinet parenting plans since that date. Appellant

also argues that the court failed to find that there was no reasonable expectation of improvement in her care for the child in the future, as required by KRS 625.090(2)(g). The Cabinet responded to this claim by showing that Appellant was a fugitive from the law for more than 90 days in the summer and fall of 2003, and that during that time she failed to contact her son or the Cabinet. Further, the Cabinet presented evidence of Appellant's failure to care for the child properly prior to December 2002, and her ongoing and longstanding difficulties with drug addiction, theft and assault.

Appellant argues that her failure to visit the child for a period of more than 90 days when she moved to Louisville does not constitute abandonment. She has no explanation for her actions during that time. The record shows that her child had no contact with her during this period of months, and had no idea where she was or whether she was dead or alive. Similarly, she had no idea of his care or condition during that 7 month period prior to her arrest. Appellant's actions satisfy the legal requirement for a showing of abandonment.

The law requires the court to balance the best interests of the child against the mother's custody interests. D.S. v. F.A.H., 684 S.W.2d 320, 323 (Ky.App. 1985). The record before the court showed that the child's emotional difficulties were lessening in his stable environment, and that his foster

parents desired to adopt him. The testimony of the expert witness showed that the child's mental condition might worsen if he were returned to Appellant's care and custody.

A trial court's determination cannot be set aside unless the findings are shown to have been clearly erroneous. R.C.R. v. Cabinet for Human Resources, 988 S.W.3d 36, 39 (Ky.App. 1998). A ruling is clearly erroneous only where no substantial evidence exists in the record supporting the court's findings. V.S. v. Commonwealth, 706 S.W.2d 420, 424 (Ky.App. 1986). The trial court has broad discretion in determining whether a child fits within the abused or neglected category, and whether such abuse or neglect warrants termination of parental rights. R.C.R. v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998). This Court may not substitute its judgment for that of the trial court. Riechle v. Riechle, 719 S.W.2d 442 (Ky. 1986). No showing has been made that the trial court's determination was clearly erroneous. For this reason, the ruling of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin P. Fox
Frankfort, Kentucky

BRIEF FOR APPELLEE, CABINET
FOR FAMILIES AND CHILDREN:

Jerry M. Lovitt
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